

## EMPLOYEE MISCLASSIFICATION ADVISORY TASK FORCE ENFORCEMENT COMMITTEE ANNUAL RECOMMENDATIONS

### The Enforcement Committee found the following during its discussions:

1. There are two criminal offenses which customarily go along with Employee Misclassification in the construction industry: (1) the commission of a “fraudulent insurance act” in violation of the Workers Compensation Fraud Act (T.C.A. §56-7-103), and (2) misrepresentations made in order to avoid premium payment in violation of the Employment Security Act (T.C.A. §50-7-711). According to AOC records from the past four years, there has been exactly one (1) criminal case filed against an employer for violation of the Employment Security law. That case is presently set for trial in May, 2013. While there have been twenty-four (24) cases filed for fraudulent insurance acts during the past four years, most of those are believed to have been filed against employees, and only two (2) are known to have been filed against employers. Of those, one (1) resulted in the employer receiving a ten (10) year sentence (nine (9) years suspended; one (1) year to be served on weekends) and an order to pay restitution to the defrauded insurance companies.
2. The Tennessee Department of Labor and Workforce Development – Workers’ Compensation Division, Employee Misclassification Education and Enforcement Fund (EMEETF) focuses on **civil litigation** but can refer cases to the proper criminal law enforcement and prosecutorial agencies when it has reason to suspect that criminal investigation and prosecution is necessary. To date, no cases have been referred for **criminal prosecution** by EMEETF since no thresholds or guidelines for determining which cases qualify for prosecution have been suggested by the member agencies.
3. EMEETF currently investigates employers who misclassify employees as independent contractors, underreport the number of employees, underreport the amount of payroll, and misrepresent the type of work being performed. During the investigation, inspectors interview relevant parties, gather evidence, prepare investigation reports, send warning letters, and make referrals to member agencies and carriers. **At this time, there are no administrative penalties for noncompliance.** However, EMEETF is waiting on legislative authority to increase enforcement capabilities.

EMEETF can refer cases of suspected employee misclassification fraud to the appropriate local District Attorney (DA), who has discretion to request an investigation by the Tennessee Bureau of Investigation (TBI). If the DA decides to request a TBI investigation, the TBI would be required to assign an agent to investigate. Once the investigation is complete and the evidence establishes what the DA believes is enough evidence to prove employee misclassification fraud beyond a reasonable doubt (increased burden of proof in criminal trials; civil trials merely require a preponderance of the evidence), the DA will advance the case through the criminal justice system.

4. The current **criminal enforcement** effort is inadequate and must be improved if there is to be any criminal prosecution of employee misclassification in the construction industry.

Neither the District Attorneys nor the State Attorney General have enough investigators at present to investigate a large amount of criminal employee misclassification cases.

**EMEEF lacks the statutory authority to civilly penalize employers engaged in employee misclassification or the tools by which to enforce proper classification of employees.**

**The Enforcement Committee makes the following recommendations:**

**1. Utilize Administrative Penalty Process**

The Task Force recommends enacting legislation that allows the Department of Labor and Workforce Development to assess administrative penalties. While the current system for prosecuting criminal cases is appropriate for the most egregious of offenders defrauding insurance companies and avoiding tax implications due to employee misclassification, a civil penalty and litigation system is better equipped to penalize and bring the “smaller fish” into compliance given the inherent difficulties and expense, in time, money, and burden of proof, in using the criminal justice system to punish lesser offenders.

EMEEF needs the statutory authority to penalize employers who misclassify employees to avoid/reduce insurance premiums, avoid tax implications, etc. The penalties should be a set dollar amount per employee misclassified and/or at least 1.5x the amount of premium/tax avoided by the misclassification. This penalty structure has proven effective for the Uninsured Employers Fund in penalizing employers who lack workers’ compensation coverage and bringing them into compliance.

**2. Establish Thresholds/Guidelines for Criminal Referrals**

The Task Force recommends that the Legislature establish clear thresholds designating which incidences of employee misclassification rise to the level of criminal prosecution. In order to address employers whose misclassification actions rise to a level where criminal prosecution is necessary in order to punish the most egregious of offenders, the Committee recommends that the Legislature delineate clear boundaries as to when incidences of employee misclassification should be handled criminally and when they should be pursued administratively. EMEEF should also refer to the DA’s and local law enforcement agencies any instances of employers who defy stop work orders for proper prosecution for failure to comply with a court order. The Committee recommends that violation of a stop work order should constitute a minimum of a Class E felony.

**3. Grant Authority to Issue Stop Work Orders**

The Task Force recommends that the Department of Labor and Workforce Development be granted authority to issue stop work orders against non-compliant employers as part of the Department’s enforcement capabilities. The Committee also strongly recommends statutory authority for the Commissioner of the Department of Labor and Workforce Development or the Commissioner’s Designee to issue stop work orders against employers who fail to comply with Orders to properly classify their employees, properly

report employee information to their insurers, and/or pay civil penalties levied by the Department. Preventing smaller offending employers from conducting further business will likely be a more effective enforcement method than monetary penalties alone.

Statutory authority to issue and enforce targeted stop work orders against offending employers who fail to comply with the workers' compensation law is an invaluable and necessary tool for bringing employers who engage in employee misclassification practices into compliance with the law. Short of criminal prosecution, which is costly, time consuming, labor intensive, and involves a higher burden of proof, issuing and enforcing a stop work order against a violating employer may be the only way to bring some violators into compliance.

Without this statutory authority, the Committee feels other enforcement efforts will be inadequate.